In the Supreme Court

OF THE

United States

OCTOBER TERM, 1938

No. 15

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, et al.

No. 17

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED.

PETITION OF ELIZA R. P. CHRISTIAN, AN INCOMPETENT PERSON, BY HERMAN V. VON HOLT, HER GUARDIAN, FOR A REHEARING.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian, petitioner in No. 17 and respondent in No. 15, hereby, pursuant to Rule No. 33, makes application and petition for a rehearing of said causes and for a stay of the issuance of mandate pending action on the application for rehearing.

INTRODUCTION.

We do not seek to reopen any question regarding the scope of review by the Circuit Court of Appeals on appeal from the Supreme Court of Hawaii. In the opinion handed down on November 7, 1938, this Court lays down definitely and clearly the limits which shall confine Circuit Courts of Appeals in reviewing asserted errors of the Supreme Court of Hawaii, or the highest Court of any territory. It is declared that although, by virtue of the statutory right of appeal, the Circuit Court of Appeals "had complete power to reverse any ruling of the territorial Court on law or fact" (Op. p. 13), "this power should be exercised only in cases of manifest error" (Op. p. 13), or where there has been "clear departure from ordinary legal principles". (Op. p. 13.) This rule of federal action on appeals from territorial Courts has heretofore been deemed to apply only to questions of local law.[1] The extension of the rule to questions of gen-

1. *Matta v. Alonso Hermanos*, 300 U. S. 430, 432, cited at p. 13 of the Opinion.

eral law is recognized in the opinion (p. 13) as novel. It is rested on grounds of policy which are here applied to appeals from territories in analogy to the action of federal Courts on questions of state law, although the opinion notes (p. 13) that the 34th Section of the Judiciary Act, which was involved in *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, and which gives legislative sanction to the policy, is not applicable to territories.

Since we are not asking the Court to reconsider or to modify the enlarged or altered rule of decision on appeals from territorial Courts, we accept as final the determinations of the Supreme Court of Hawaii:

(1) That the lease of 1905 should not be set aside.

(2) That the incompetent should repay, or secure the repayment of, the purchase price of her one-third interest in the Holt lands as a condition to the cancellation, as to her, of the deed of May 2, 1910.

(3) That certain lands occupied by improvements, and certain other lands and rights-of-way should be reserved to Waialua.

Our sole attack is with respect to the instrument of 1906—to the holdings that the right to rents (other than under the lease of 1905) for Eliza's life passed to Annie Kentwell under that instrument and, more specifically, that such right was transferred by the deed of May 2, 1910 to James Lawrence Holt and through him to Waialua. The rulings of the Supreme Court of Hawaii on these points, and their acceptance by this Court, lead

to the result that the incompetent, while recovering an estate in fee in one-third of the Holt lands, can enjoy neither possession nor any beneficial fruits of her title during her entire life, and her recovery, therefore, gives her only an empty shell, without substance. If this follows the application of sound, or even tenable, rules of law, she must submit to the result, however unfortunate. If, however, as we contend, the conclusion rests on manifest and palpable error by the Supreme Court of Hawaii, she can be given relief, without in the slightest degree departing from the rule which this Court has laid down with respect to the weight, on appeal, of the rulings of the territorial Court.

We respectfully submit that we have not had an opportunity to show by argument that the holding of the Supreme Court of Hawaii that the right to rents during Eliza's entire life was transferred to Waialua through the deed of May 2, 1910 was manifestly wrong, indeed inconsistent with the holding of the Supreme Court of Hawaii that the instrument of 1906 did not assign or transfer "any interest in the land." We did not argue this point here—as we did in the Circuit Court of Appeals—because we relied on the repeated decisions of this Court that, on certiorari to the Circuit Court of Appeals, no questions other than those raised in the petition would be considered.[2] The rule was clearly restated as recently as May of this year in *Crown C. & S. Co. v. Ferdinand Gutmann Co.*, 82 L. ed. Adv. Op.

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2. *Washington V. & M. Coach Co. v. National Labor Board*, 301 U. S. 142, 146; *Morehead v. New York*, 298 U. S. 547, 604, 605; *Clark v. Williard*, 294 U. S. 211, 216; *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242.

835, and in *General Talking Pictures Corporation v. Western Electric Company*, 82 L. ed. Adv. Op. 843.[3]

A glance at the petition of Waialua for certiorari will show that the statement "of the matter involved and the reasons relied on for the allowance of the writ"[4] was directed exclusively to the holdings below with respect to the lease of 1905 and the deed of May 2, 1910. The instrument of 1906 is not mentioned in the petition or in the supporting brief.

We make two points:

1. That if this Court is free to review the decision of the Circuit Court of Appeals on a question not raised in the petition for certiorari, the Supreme Court of Hawaii committed clear and manifest error in holding that the incompetent has lost, and Waialua has acquired, the right to all rents to accrue from the land during the life of the incompetent.

2. That, under the rules and decisions of this Court, the decision of the Circuit Court of Appeals on the construction of the instrument of 1906 is not open to review here.

Either of these points would lead to the same result, i. e, the establishment of the right of the incompetent to recover rents from and after April 1, 1930.

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3. The order for rehearing in the *General Talking Pictures* case was expressly limited to "the first two questions presented in the petition", 82 L. Ed., Adv. Op. 1045.

4. Rule 38.

I.

THE HOLDING OF THE SUPREME COURT OF HAWAII THAT THE DEED OF MAY 2, 1910 TRANSFERRED TO HOLT, AND THROUGH HIM TO WAIALUA, THE RIGHT TO RENTS TO ACCRUE FROM WHATEVER SOURCE FOR ELIZA'S LIFE IS MANIFESTLY WRONG.

In presenting this point (which, as stated above, we have had no opportunity to argue before) we assume, for the purpose of the argument, the correctness of the holdings of the Supreme Court of Hawaii regarding the construction and the legal effect of the instrument of 1906. We insist that, if those holdings are right, it inevitably follows that the further holding that the right to rents after 1930 passed to Holt by the deed of May 2, 1910 is clearly wrong.

The decision of the Supreme Court of Hawaii with respect to the instrument of 1906:

The Supreme Court decided not one, but three, important questions with respect to the instrument of 1906.[5] They were:

(1) That, in the words of this Court (Op. p. 9) "The construction of the contract for maintenance of 1906 was that it covered rents, issues and profits, payable to the incompetent not only from the lessee under the 1905 lease but also 'the rents accruing thereafter from whatever source' ".

(2) That "if the instrument of 1906 was a conveyance of any interest of Eliza's in the land, it was invalid for lack of her husband's written consent", under Section 2993, R. L. of Haw. 1925 pro-

5. *Christian v. Waialua Agricultural Company, Limited*, 33 Haw. 34, 50-51.

viding that "no sale or mortgage of" a wife's "real estate shall be valid without the written consent of her husband".[6]

(3) That the transfer of the right to rents during the lifetime of the transferor did not transfer any interest in land.[7]

Only the first of these holdings is mentioned in the opinion of this Court. The other two are vital to a consideration of the point urged by us.

Granting that the construction placed on the instrument was correct, or even tenable, it is clear that holding (3), i.e., that the instrument conveyed no estate or interest in the land, was essential to the upholding of its validity. Without that holding the instrument would, as the Supreme Court itself declared, have necessarily been invalid for want of the husband's consent. The conclusion that the incompetent is not entitled to rents after 1930 can only rest upon the determination that the instrument of 1906 transferred no estate or interest in the land.

Accepting as controlling, for the purposes of the present argument, the determination that no interest in the land passed to Annie Kentwell by the instrument of 1906, we look to the deed of May 2, 1910 to ascertain whether the right to rents (other than under the lease of 1905) could on any possible interpretation have properly been

6. The declaration that the instrument is not valid as a conveyance of an estate or interest in the land is incorporated in the decree also. (R. 655.)

7. The Supreme Court of Hawaii (33 Haw. 34, 50-51; R. 568-9, argues this proposition at considerable length, and states, at least four times, that the instrument of 1906 does not evidence an intention to convey, and that it did not convey or transfer any interest in the land.

held to have been included in the description or designation of what was conveyed or transferred by Annie Kentwell to Waialua.

The only document through which Waialua claims to have succeeded to Annie Kentwell's rights is the deed of May 2, 1910. There is no other instrument of transfer purporting to carry with it any rights assigned by Eliza to Annie Kentwell. Starting with the necessary premise that the instrument of 1906 assigned to Annie Kentwell all rents to accrue from the land during Eliza's life, *but did not transfer or convey any interest in the land,* the question, then, is what, if anything, other than an interest in the land, did the deed of May 2, 1910 convey or transfer? We submit that the only tenable answer is that the deed transferred Eliza's right to rents under the lease of 1905, and nothing more.

The deed of May 2, 1910:

We have attached hereto an Appendix, containing a copy of the deed (omitting certificates of acknowledgment), and for more convenient reference have numbered the lines of the copy.

We venture, with all deference, to suggest that, in considering the language and effect of the deed, this Court apparently did not have in mind the vital circumstance that, under the unassailed, and now unassailable, ruling of the Supreme Court of Hawaii, the instrument of 1906 did not convey (and consequently Annie Kentwell did not own) any interest in the land. The omission to consider this ruling was, as we have pointed out, due to the fault (if fault it was) of counsel in assuming that the construction

placed by the Circuit Court of Appeals on the instrument of 1906 was final on certiorari here, and to the consequent failure to argue the point now presented.

The deed of May 2, 1910 has all the familiar characteristics of an instrument conveying an interest in real estate. We find in it the designation of the parties as "grantors" and "grantee", recital of the consideration, operative words of grant ("give, grant, bargain, sell and convey"), description of the land conveyed, habendum and tenendum clause, and covenants of good title, of right to convey, against encumbrances, of warranty, and for further assurance.

By the deed, the grantors grant, bargain, sell and convey to the grantee a one-third interest in the Holt lands, that interest being the one-third devised by the will of R. W. Holt to John D. Holt for life with remainder to his heirs.[8] The conveyance is declared to be "subject" to two instruments, (a) the deed of trust from James L. Holt to Colburn, and (b) the lease of 1905 to Waialua.[9]

So far, the instrument is unquestionably a conveyance of interests in land, and nothing else. It did not purport to carry, and did not carry, any right which was not an interest in land, such as the right to rents (after the term of the lease, from any source, during Eliza's life).

Following the declaration that the conveyance is subject to the deed of trust and the lease, the deed declares that the grantors assign and set over to the grantee

8. Deed, lines 40 to 43, lines 86 to 89.
9. Deed, lines 46 to 52.

"all claims and demands which they may have arising out of either of said instruments or in any other way" against James L. Holt, Colburn, or Waialua Agricultural Company, Limited.[10]

The question under consideration is whether, by this language—and there is none other in the deed which bears upon the question—Annie Kentwell assigned to Waialua "all rents, issues and profits from the land * * * which have accrued or will accrue to Eliza R. P. Christion * * *, from whomsoever due * * * until the end of the natural life of * * * said Eliza * * *", as held by the Supreme Court of Hawaii in its opinion[11]—and decree[12]—a holding sustained by this Court.[13]

In this inquiry the references to the deed of trust and to claims or demands against James L. Holt, or his trustee, may be disregarded as entirely irrelevant because (a) the deed of trust covered only the life estates of James R. Holt, father of James Lawrence, and of John D. Holt, Eliza's father, both of whom died during the term of the lease of 1905, and (b) neither James L. Holt nor Colburn had any interest whatsoever in rents to accrue to Eliza after the vesting of her one-third remainder on the death of her father, and Annie Kentwell did not, and could not, have or assert any claim or demand against either of them with respect to such rents. The clause ("assigning and setting over to the said grantee all claims or demands which they may have

10. Deed, lines 56 to 61.
11. 33 Haw. 34.
12. R. 655.
13. Opinion, p. 14.

* * *") should therefore be considered as if the lease of 1905 were the only instrument to which it makes reference, and the only claims and demands assigned were claims and demands against Waialua.

The clause in question, under any possible interpretation, purported to assign only claims and demands existing against Waialua at the date of the deed—May 2, 1910. No such claims and demands then existed except claims and demands under the lease of 1905. What the grantors assigned was claims and demands arising under the lease, or in any other way, "which they may have" against Waialua. The phrase "which they may have" is in the present tense. It describes claims and demands then in existence, and those only. Any claim for rents, issues and profits which might arise in the future, independently of existing contractual or other relations between the parties, was not included in "claims and demands which they may have".

Waialua had, in 1910, no claim or right to the possession of this one-third interest in the Holt lands except under the lease of 1905. Any claim of Eliza or of Annie Kentwell, as her assignee, against Waialua, or any other possible occupant, for rents after the expiration of the lease, would be a new and after acquired claim, springing into existence from an occupancy or possession originating for the first time after the rights of Waialua under the lease should have terminated.

Without wishing to labor the obvious, we suggest an illustration to demonstrate that the words "claims which they may have" do not cover claims which may come

into being in the future. If A should execute a paper releasing B from all claims and demands of every nature which A "may have" against B, or should execute an assignment to C of all such claims, and B should, one or five years thereafter, borrow money from A, giving his promissory note therefor, or if B should negligently injure A or his property, could it conceivably be held that the right of A to maintain an action on the note, or to recover damages for the tortious injuries, had been released or assigned?

There is abundant and uniform authority to the effect that after acquired property or rights are not transferred by an instrument where there is no intention apparent from the instrument to convey such property or rights.[14]

That the words "which they may have" do not indicate any such intention is not only apparent on their face, but is demonstrated by comparison with other parts of the deed, where, when it was intended to convey interests in the land which might be acquired in the future, language was used which expressly declared the intention to convey such after-acquired interests. Thus, the deed declares[15] the intention of the grantors to convey all their interest in, or which they or either of them may acquire, in said lands, and particularly every interest which they or either of them "may now have or may hereafter acquire * * *". The draftsman of this deed was evidently familiar with the distinction between

14. 18 C.J. 292, and many cases cited.
15. Deed, lines 34 to 38.

words of present transfer and words necessary to transfer an after-acquired interest. In the clause last referred to, declaring the intent to convey the interest of the grantors in the land, we find not only words of present transfer, substantially identical with the words defining the claims and demands transferred, but a declaration, twice repeated, of an intention to convey the interest which the grantors or either of them "may hereafter acquire". Under familiar and well-settled rules, the words of assignment of "all claims and demands which they may have" could not, without "clear departure from ordinary legal principles", be held to transfer any rights beyond those which the grantors or any of them then had against Waialua.

In another particular, the holding of the Supreme Court of Hawaii that the deed of May 2, 1910 transferred the right to rents, issues and profits "from whomsoever due" is manifestly unwarranted by the language of the instrument. The only rights, claims and demands assigned are claims and demands *against Waialua*. The transfer cannot cover claims for rent against a future occupant other than Waialua. It is quite possible that Waialua may, during Eliza's life, part with or lose its right of possession, through partition, sale or otherwise.

The necessary conclusion, then, is that rents after 1930 did not pass by the deed of May 2, 1910, because that deed does not purport to transfer anything but (a) the interests of the grantors in the land—and these rents were not an interest in the land—and (b) rights against Waialua under the lease of 1905.

The conclusion just expressed not only rests on the plain language of the deed, but it is in harmony with the true intent of the parties to that instrument. The deed of May 2, 1910 refers several times to two specific instruments—the Colburn deed of trust and the 1905 lease. It does not mention the 1906 instrument. The omission is significant. Holt, in purchasing, and the Kentwells in selling, Annie's rights and claims for $5,000, had no thought or intention of transferring any right to rents for Eliza's life. Negotiations between these parties were entirely by letter or cable. The correspondence shows clearly that the right for which Annie demanded and received $5,000 was her asserted right to monthly payments from Colburn, as owner in trust of the life estate which had been conveyed by John Dominis Holt to James Lawrence Holt and by the latter to Colburn, trustee.[16].

We may assume that, in reviewing a decision of the Supreme Court of Hawaii, whether it involves the interpretation of a writing or some other question of law, the Circuit Court of Appeals or this Court will, in determining whether there has been "manifest error", view the determination of the territorial Court with liberality, but we submit that that liberality should not be stretched to such an extreme limit that the right of appeal given by the statute is rendered futile or virtually abrogated.

It should be added that, if the rights to rents after 1930 did not pass from Annie Kentwell to Waialua, that

16. Exh. D-5, R. 913; Exh. D-6, R. 915, at 916; R. 148, 151.

right now belongs to Eliza. Annie Kentwell was a party to the suit; the judgment of the trial Court declared the instrument of 1906 void and of no effect as between Eliza and her[17]; Annie Kentwell did not appeal from the judgment and it is final as against her. Furthermore, as between Eliza and Annie, Annie's position as assignee under the instrument of 1906 is devoid of any equity. She took with knowledge of Eliza's incompetency[18], and both Hawaiian Courts agreed that a transfer by an incompetent to a transferee with notice of the incompetency should be set aside as against the transferee.[19]

II.

THE CONSTRUCTION PUT UPON THE INSTRUMENT OF 1906 BY THE CIRCUIT COURT OF APPEALS WAS NOT QUESTIONED BY WAIALUA IN ITS PETITION FOR CERTIORARI, AND IS THEREFORE NOT A SUBJECT FOR REVIEW HERE.

We have already[20] cited a few of the many decisions of this Court holding that it will not, on certiorari, review any questions other than those specifically presented in the petition for the writ. Under the preceding heading of this petition, we pointed out that, because of our reliance on these decisions, we had not argued to this Court the questions which would arise if the instrument of 1906 were construed as purporting to assign to Annie Kentwell anything more than rents to accrue to Eliza under the lease of 1905. These questions are argued under heading I of this petition.

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17. R. 537.
18. R. 133, 481, 491.
19. R. 274, 537, 573.
20. Supra, pp. 4-5.

We now go further and respectfully ask this Court to apply here, as it has done so often, its practice of limiting the review on certiorari to questions raised in the petition for the writ.

The practice (which as indicated in *General Talking Pictures Corporation v. Western Electric Co.*[21] is an application of, or deduction from, Rule 38 of this Court) has not perhaps the force of an absolute rule of law. It is a rule established to facilitate the disposition of the Court's business. It may be described as a rule of policy, a policy closely analogous to that declared in the opinion in this case to govern the action of Circuit Courts of Appeals in reviewing decisions of territorial Courts. But, we submit, the rule should not be disregarded in a particular case unless there is strong reason for so doing and no such reason appears here. Adherence to the rule in this case would in no way weaken the effect of the opinion in defining the limits of the scope of review on appeals from the Supreme Court of Hawaii. It would merely apply the general doctrine that a party is bound in an Appellate Court by rulings below which he has not attacked. This Court has said, in a case coming to it on certiorari to a Circuit Court of Appeals: "This Court has the same power and authority as if the case had been carried here upon appeal or writ of error. A party who has not sought review by appeal or writ of error will not be heard in an appellate Court to question the correctness of the decree of the lower Court. This is so well settled that citation is

21. Supra, p. 5.

not necessary."[22] The application in this case of the rule contended for would merely apply the policy underlying Rule 38, without any departure from the policy which is held to require affirmance of the decision of the Supreme Court of Hawaii on the points brought to this Court for review.

The writ of certiorari is directed to the Circuit Court of Appeals, and it is the judgment of that Court which is here for review. The Circuit Court of Appeals held that the correct construction of the instrument of 1906 was that it transferred rents under the lease of 1905 only. In this respect it reversed the decision of the Supreme Court of Hawaii. That it had "complete power" so to do is declared by this Court.[23] It may have exercised this power or jurisdiction erroneously, but, if it committed error, its determination was still effectual, unless attacked by appropriate means of review.

Just as the petitioner for certiorari is not entitled to a review of questions not presented in his petition, so the adverse party will not be heard on additional and independent questions, unless he has also petitioned for certiorari.[24] This is a corollary to the rule limiting the scope of review on certiorari granted on the petition of one party alone. It is interesting to note that in the very recent case of *Kellogg Co. v. National Biscuit Co.*, Nos. 2 and 56, decided on November 14, 1938, after the

22. *Federal Trade Commission v. Pacific States P. T. Association*, 273 U. S. 52, 66.

23. Opinion, p. 13.

24. *Federal Trade Commission v. Pacific States P. T. Ass'n.*, supra; *Lloyd Sabaudo, etc. v. Elting*, 287 U. S. 329; *Alexander v. Cosden Pipe Line Co.*, 290 U. S. 484.

decision in the instant case, the Court applied the rule that on certiorari, where one of the parties did not petition for a writ, a question which that party sought to raise in this Court "is not here for review".

If the construction of the instrument of 1906 as a transfer of no more than rents under the lease of 1905 is final and conclusive here, the instrument of 1906 has no significance except as an assignment of rents under that lease. The lease having been held valid and all rights under it having been held to have passed to Waialua, nothing further is left upon which the instrument of 1906 can operate, and the incompetent is clearly entitled to rents from the date of the expiration of the lease, i.e., April 1, 1930.

CONCLUSION.

This petition, limited as it is to the single question whether the right to rents after April 1, 1930 has passed from Eliza to Waialua, may be granted, and the question determined, without the necessity for any reconsideration of the major rule of decision announced in the opinion herein, or of any of the propositions decided by the Supreme Court of Hawaii other than the single one affecting the operation or the effect of the instrument of 1906. Relatively minor amendments of, or additions to, the opinion already filed, would be sufficient to make the determination conform to what we, in all sincerity, maintain are the settled and proper rules to be applied. We ask

therefore that a rehearing, limited as above stated, be granted.

We further respectfully ask that, pending action on this petition, the issuance of a mandate be stayed.

Dated, November 25, 1938.

Respectfully submitted,

M. C. SLOSS,

CHARLES M. HITE,

Attorneys for Eliza R. P. Christian, An Incompetent Person, by Herman V. Von Holt, her Guardian.

SLOSS, TURNER & FINNEY,

Of Counsel.

Certificate of Counsel on Petition for a Rehearing.

I, M. C. Sloss, one of counsel for Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian, petitioner in the foregoing petition for a rehearing, herewith certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

M. C. Sloss,
Counsel for Petitioner.

Dated, November 25, 1938.

(Appendix Follows.)

Appendix

DEED OF MAY 2, 1910. (R. pp. 953-7.)

Know all men by these presents:
That we, John Dominis Holt, Widower, Eliza R. P. Christian, wife of Albert Christian, daughter
R.W.—V.C.
and of
of sole heir ~~and~~ said John Dominis Holt, Annie Holt Kentwell, and Lawrence K. Kentwell, husband of the said Annie Holt Kentwell, all now commorant at Oxford, in the County of Oxford, in the United Kingdom of Great Britain and Ireland, hereafter termed the Grantors, in consideration of the sum of Thirty-five thousand dollars ($35,000.00) to them in hand paid by James Lawrence Holt of Honolulu, in the Territory of Hawaii, in the United States of America, hereafter termed the Grantee, the receipt of which sum is hereby acknowledged, have given, granted, bargained, sold and conveyed and by these presents do give, grant, bargain, sell and convey unto the said James Lawrence Holt, the said Grantee, one undivided third part of interest in and to the following parcels of land and each of them namely:

1. Ahupuaa of Paalaa, being Apana 34 of L. C. A. 7713, R. P. 4475 to V. Kamamalu, containing an area of 12237 acres, more or less.

2. Ahupuaa of Wahiawa, being R. P. (Grant) 973, containing an area of 1942 acres, more or less.

3. R. P. (Grant) 235 to Jerome Topliffe and Louis Johnson, containing an area of 36 acres, more or less.

4. R. P. (Grant) 238 to J. F. Anderson and F. Davis, containing an area of 25.8 acres, more or less.

5. R. P. (Grant) 431, containing an area of 100 acres, more or less.

All of said lands being situated in the District of Wāialua, in the Island of Oahu and Territory of Hawaii aforesaid; intending hereby to convey all the interest of the said Grantors, whether present, prospective or in remainder, vested or contingent, of every name and descrip-

tion in and to said lands or which they or either of them may hereafter acquire in and to the said lands, and particularly every interest which the said Grantors or either of them may now have or may hereafter acquire under the Will of R. W. Holt, deceased, the father of said John Dominis Holt, and grandfather of said Eliza R. P. Christian and

R.W.—V.C.

not including Makaha

Annie Holt Kentwell,/ subject, however, to a certain Deed of Trust made by said James Lawrence Holt, the Grantee, to John F. Colburn, and to a certain lease dated the First day of April, one thousand nine hundred and five made by Carlos A. Long, Administrator and others including the Grantors herein, to the Waialua Agricultural Company, Limited, both of which instruments are of record in the Registry Office of said Territory but intending to convey all the rights of the Grantors and each of them against said Trustee and said Company and under said Deed and Lease the said Grantors assigning and setting over to the said Grantee all claims and demands which they may have arising out of either said instruments or in any other way against the said James Lawrence Holt the said Waialua Agricultural Company, Limited, or the said John F. Colburn, said Trustee, save and except the right to the personal estate of the said R. W. Holt which may be in the hands of said John F. Colburn, Trustee, it being the intention to convey all the interests of the Grantors in the estate left by said R. W. Holt or the property into which it

R.W.—V.C.

not including Makaha

has been converted/ with the exception of the said personal estate.

To have and to hold to the said James Lawrence Holt, the Grantee, his heirs and assigns, to his and their use and behoof forever.

The said Grantors, for themselves, their heirs, executors and administrators covenant with the said Grantee, his heirs, executors, administrators and assigns, that they have good title in and to the described premises; that they have good right to convey the same; that the same are

free from incumbrances, except as aforesaid; and that they will warrant and defend the same against the claims and demands of all persons, except as aforesaid; and that they and their heirs, executors and administrators will on demand of said Grantee, his heirs, executors, administrators or assigns, execute to him or them such instruments or instrument as may be necessary or by him or them deemed advisable at any time to perfect the title in the Grantee, his heirs, executors, administrators and assigns, in and to that portion of the estate of R. W. Holt devised by his Will to John Dominis Holt, and at his death to his heirs and assigns.

In witness whereof, the Grantors have set their hands and seals this second day of May one thousand nine hundred and ten, the said Albert Christian, husband of said Eliza R. P. Christian, joining in consent thereto by a separate instrument executed within said Territory of Hawaii.

John D. Holt
Eliza R. P. Christian
Annie Holt Kentwell
Albert Christian
Lawrence K. Kentwell

Witness David L. Withington
Witness to signature of Albert Christian
W. H. Chickering
Robert L. Coburn.

Due service and receipt of a copy of the within is hereby admitted

this _____ day of November, 1938.

_____

_____

Attorneys for Waialua Agricultural Company, Limited.

P. 13.

SUPREME COURT OF THE UNITED STATES.

Nos. 15, 17.—October Term, 1938.

Waialua Agricultural Company Limited, Petitioner, 15 *vs.* Eliza R. P. Christian, an Incompetent Person, etc., et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Eliza R. P. Christian, an Incompetent Person, etc., et al., Petitioner, 17 *vs.* Waialua Agricultural Company, Limited.	

[November 7, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

These cases concern the validity of a lease, a contract for maintenance and a deed, conveying or assigning rights of Eliza R. P. Christian, an incompetent, to a one-third undivided interest in land on the Island of Oahu, Territory of Hawaii.

The Supreme Court of the Territory of Hawaii in two opinions on separate appeals set aside the deed and refused to set aside the contract or lease. A decree was entered directing the reconveyance to the incompetent of her previously conveyed interest in the tract with adjustments for improvements.[1] The Circuit Court of Appeals for the Ninth Circuit refused to review the first decree on the ground that no final order had been entered.[2] Appeals were taken from the second decree by the incompetent and, after severance, by the Waialua Agricultural Company, Limited. The Circuit Court of Appeals reversed the Supreme Court of Hawaii and remanded the cause to that court with directions to remand to the trial court, with instructions to grant relief against the deed upon restitution of the consideration and to take further proceedings in

[1] Christian *v.* Waialua Agricultural Company, 31 Haw. 817; same *v.* same, 33 Haw. 34.

[2] Waialua Agricultural Company *v.* Christian, 52 F. (2d) 847.

respect to the issues concerning the validity of the lease and contract.[3] The petition for rehearing was denied. 94 F. (2d) 806. Certiorari and cross-certiorari were sought by the respective parties and granted by this Court to review the questions presented because of the action of the Circuit Court of Appeals in reversing conclusions of the Supreme Court of Hawaii as to applicable principles of law.[4]

The incompetent, Mrs. Christian, was born at Makaha in the Hawaiian Islands on December 30, 1885. She was brought to Honolulu by her father in the early 1890's. By 1901 they had gone to live with Mrs. Annie Holt Kentwell, a cousin and one of the nine children of Owen J. Holt. Except for short periods when the incompetent was in boarding school, they lived with her continuously thereafter. The incompetent's grandfather, R. W. Holt, had died in 1862 leaving a will which devised an equal undivided portion of the real estate involved in these cases to each of his three sons for life and then to the heirs of each in fee simple. One of these sons was John Dominis Holt, the father of the incompetent. The father was living at the time of the execution of the documents here questioned, dying in 1922.

That portion of the grandfather's estate involved in these cases consisted of approximately fourteen thousand acres of land. At the time of the first transactions here considered, one of the sons, Owen J. Holt, had died leaving nine children, each entitled to a one-twenty-seventh interest in fee simple in the tracts. A second son, James R. Holt, was living but had conveyed his life estate to his son, James Lawrence Holt. This son had also purchased the contingent remainder of his brother, Robert Holt and the life estate of the incompetent's father, John Dominis Holt. Subject to whatever risk there was that his father, James R. Holt, born in 1838, would have other children after 1905, James Lawrence Holt was, in the year last mentioned, the owner of a one-third interest in the property, plus the life estate of his uncle, John Dominis Holt, in another third. James Lawrence Holt had transferred all these interests to John F. Colburn as Trustee. The property in 1905 was "wholly uncultivated and covered with noxious weeds, including such well-known pests as lantana and *klu*. The taxes at that time were four years in arrears."

[3] Christian v. Waialua Agricultural Company et al., 93 F. (2d) 603.
[4] Matos v. Hermanos, 300 U. S. 429.

On March 17, 1905, the administrator *de bonis non* with the will annexed of R. W. Holt, several of the heirs of his son, Owen J. Holt, and the Hawaiian Realty and Maturity Company, Limited, executed a lease to the Waialua Agricultural Company, Limited, for twenty-five years at an annual rental of $9,000. The administrator was treated in this lease as having title to two-thirds of the whole. The owners of the contingent remainders, one of whom was the incompetent, joined with the lessors in covenanting that the lessee while paying said rent "shall peaceably and quietly hold and enjoy the use and possession of said demised premises . . ."

On the 31st day of August, 1906, the incompetent entered into a contract for maintenance with her cousin, Annie Holt Kentwell. This instrument evidenced an assignment of her title and interest in and to any and all rents, issues and profits due or payable under the above lease or "by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of" her natural life. The consideration for the contract was the assumption by Mrs. Kentwell of the support and maintenance of the incompetent. The instrument appears in a footnote.[5]

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[5] "THIS INDENTURE—made this 31st day of August A. D. 1906, by and between—ELIZA R. P. CHRISTIAN—(the only child and heir of John Dominis Holt, the elder) of Honolulu, Island and County of Oahu, Territory of Hawaii, of the first part, and—ANNIE HOLT KENTWELL—of the same place, party of the second part.

"WITNESSETH—Whereas the party of the first part has for many years last past been supported and maintained at the home of the party of the second part, and at the cost and expense of the said party of the second part, and

"WHEREAS—the said first party is the only child and heir of John Dominis Holt, the elder, being also a devisee under the Will of R. W. Holt, deceased, and is entitled in expectancy to a certain undivided interest or moiety in certain lands situate at Waialua, Oahu, now leased to the Waialua Agricultural Company, Limited, by lease dated the 17th day of March, 1905, and recorded in the Hawaiian Registry of Deeds in Liber , Folio, and

"WHEREAS—by virtue of being such heir of John Dominis Holt, the elder, and such devisee under the will of R. W. Holt, deceased, aforesaid, she, the said party of the first part, shall upon the death of him, the said John Dominis Holt, the elder, be entitled to her share of the rents reserved in said lease aforesaid, which share of said rents aforesaid is now enjoyed by her father, the said John Dominis Holt, the elder, and

"WHEREAS—the party of the second part has agreed to support and to maintain the party of the first part for and during the period of the natural life of her, the said party of the first part,

"NOW THEREFORE THIS INDENTURE WITNESSETH—That the said—ELIZA R. P. CHRISTIAN—in consideration of the premises and of One Dollar to her in hand paid by—ANNIE HOLT KENTWELL—of Honolulu aforesaid, the receipt whereof is hereby duly confessed and acknowledged and for other and

A deed was executed on May 2, 1910, in which the incompetent and her husband, Albert Christian, her father, John D. Holt, and Annie Holt Kentwell, and her husband, were parties grantor and James Lawrence Holt was grantee. This deed, in consideration of $35,000 conveyed "one undivided third part of interest" subject to the grantee's interest and to the lease of 1905. The deed evidenced the intention "to convey all the interest of the said Grantors, whether present, prospective or in remainder, vested or contingent, of every name and description in and to said lands or which they or either of them may hereafter acquire in and to the said lands." The deed further declared that the grantors assigned and set over to the grantee "all claims and demands which they may have arising out of either said instruments [i. e., the ones dealing with James Lawrence Holt's interests and the lease] or in any other way against the said James Lawrence Holt, the said Waialua Agricultural Company, Limited, or the said John F. Colburn, said Trustee" with exceptions not material here. The grantors further agreed to warrant the property conveyed against the claims and demands of all persons.

The grantee, James Lawrence Holt, and his trustee, John F. Colburn, conveyed the interest and rights acquired by this deed together with the other one-third undivided interest then belong-

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valuable consideration to the said—ELIZA R. P. CHRISTIAN—moving from said—ANNIE HOLT KENTWELL—, she, the said—ELIZA R. P. CHRISTIAN—, does hereby give, sell, assign, release, transfer and set over unto the said—ANNIE HOLT KENTWELL—, her heirs, executors and administrators, all her title and interest in and to any and all rents, issues and profits to which she may hereafter be entitled or which may be due and payable to her by, through or under the lease to the Waialua Agricultural Company, Limited, dated the 17th day of March, 1905, and recorded in said Liber Folio or by virtue of being the only child of John Dominis Holt, the elder, and devisee under the will of R. W. Holt, deceased, together with all and every her right to demand, receive, collect and receipt for all such rents, issues and profits from whomsoever due during the term of the natural life of her, the said—ELIZA R. P. CHRISTIAN—.

"AND—it is expressly agreed and understood between and by the parties hereto that the party of the second part shall support and maintain her, the party of the first part, for and during the natural life of said first part.

"AND—it is further agreed and understood by and between the parties hereto that in case the party of the first part shall survive the party of the second part, the heirs of said second party shall be entitled to perform the covenant of this agreement on the part of said second party to be kept and performed, and they shall during the life of said first party be entitled to the benefit or benefits thereof.

"IN WITNESS WHEREOF—the said—ELIZA R. P. CHRISTIAN—and—ANNIE HOLT KENTWELL—have hereunto set their hands and seals the day and year first above written.

ELIZA R. P. CHRISTIAN
ANNIE HOLT KENTWELL"

ing to James Lawrence Holt to other grantees. By successive conveyances the incompetent's property, covered by the deed of 1910, came into the ownership of the Waialua Agricultural Company, Limited, a defendant in the trial court.

Beginning at about the time when the tract came into the possession of Waialua under the lease, Waialua acquired, through various conveyances, fee simple interests of seven of the nine children of Owen J. Holt. When this action began in 1928, Waialua held in fee simple by color of title twenty-five twenty-sevenths of the property. Under the lease of 1905 it began to improve the property. The lease provided that the improvements would revert to the lessors. After the conveyances in 1910 of the life and remainder interests, covering two-thirds of the fee, Waialua made further important installations. Besides the fourteen thousand acres of the Holt lands, the Waialua plantation includes an additional thirty-six thousand acres. The properties are developed and operated as a unit,—9,904 acres in sugar cane, 11,625 acres in pineapple, the balance uncultivated or used for servicing the crop lands. The record shows a total expenditure of $630,722.12 for improvements on the Holt lands between April 1, 1905, and April 5, 1928, when Waialua was notified the deed was questioned. In addition reservoirs, ditches and other improvements, off the Holt lands but necessary for their use, have cost Waialua $514,594.94. No description is necessary other than to say that the improvements consist of reservoirs and ditches, roads, pumps, communication systems, camps, overseers' houses, and the other usual fixtures and appurtenances necessary for the operation of a large irrigated plantation.

After the lease had been in operation for a few years, it was found that some sixty-five hundred acres of the Holt lands were suitable for the growing of pineapples. After trying multiple subtenancy, an agreement was made in 1922 with the Hawaiian Pineapple Company giving it an option to lease all the Waialua pineapple lands at $15 per acre. Under the option Waialua invested over three million dollars in the Pineapple Company stock and the Pineapple Company leased 6,475 acres of the Holt lands for seventeen and one-half years from January 1, 1923, to June 30, 1940, with optional extension, at a paid up rental, reached by a 5% discount, of about two million dollars.

The mechanized scientific farming of the sugar cane and pineapple lands was profitable. The trial court found that $14 per

acre was a reasonable ground rent for the Holt land used for sugar production and that $15 per acre was a reasonable ground rent for the pineapple lands after the lease to the Hawaiian Pineapple Company of January 1, 1923. A less sum per acre was found as a reasonable ground rent for the pineapple lands prior to that time.

In 1926 the ward was for the first time declared incompetent and Annie Holt Kentwell was appointed her guardian in England. In 1927 Mrs. Kentwell's brother, George H. Holt, became guardian of the estate of the ward in Honolulu. The present guardian, Herman V. VonHolt, succeeded him *pendente lite*. On May 9, 1928, a petition was filed against Waialua and James Lawrence Holt in the Circuit Court of the Territory by the guardian alleging the incompetency of the ward on the date of the execution of the deed; and that the purported consideration was inadequate and was never received by the ward. No complaint was made of the execution of the lease or the contract for maintenance. It was alleged that Waialua induced James Lawrence Holt, the grantee in the deed, to secure the conveyance of the property through Holt's connection with Annie Holt Kentwell, the dominating influence over the incompetent. The guardian prayed for the cancellation of the deed and an accounting for the rental value of the undivided one-third interest from April 10, 1922, the date of the death of the ward's father. James Lawrence Holt appeared and admitted the facts relating to his part in the transaction.

The trial court on adequate evidence found that Eliza Christian was incompetent at the time of the execution of the deed of 1910; that her incompetence had not been adjudicated by a proper protective proceeding, was not "clearly self-evident to an entire stranger" but "was known to James L. Holt, to her father, John Dominis Holt, to the Kentwells and to others who were familiar with her dependency upon the Kentwells." The court found the price inadequate and that it was not clearly shown that Waialua Company had actual notice of the incompetency of Eliza. The decree set aside the deed and entered an award for $540,906.07 in rentals, after deducting the purchase price of $30,000 and interest.

On appeal the Supreme Court of Hawaii sustained the determination of the trial court as to the capacity of the incompetent at the date of the execution of the deed, finding that "she was a congenital imbecile." It assumed that the Waialua Company "had

no knowledge of Eliza Christian's incompetency." It held that the consideration was adequate; that there was no laches; and that limitation did not bar the proceeding. It affirmed the action of the trial court in setting aside the deed of May 2, 1910, upon a repayment to Waialua by the incompetent of the purchase price, with interest from May 2, 1910, on a balance of equities, a consideration of the advantages to the incompetent and a suggestion that the consideration did not reach the grantor. The decree of the trial court as to the recovery of the rentals was reversed on the ground that Waialua had succeeded to Annie Kentwell's rights under the contract of 1906 to receive and keep the incompetent's rentals during the term of the lease. Rentals beyond the termination of the lease were not involved in the first appeal. The case was therefore remanded to the trial court to determine the validity of the lease of 1905 and the contract of 1906.

On the remand the trial court found that Eliza was incompetent at the time of the execution of the contract, that Mrs. Kentwell knew of the incompetency and that Waialua was not an innocent purchaser from Mrs. Kentwell, since it knew of a secret profit, received by James Lawrence Holt and John F. Colburn in connection with the various conveyances by which Mrs. Kentwell's interests passed to Waialua, "while these two, at the same time, knew of the mental condition of Eliza Christian." In considering the lease of March 17, 1905, the court found that Eliza was incompetent when she gave her assent; but that while the "Waialua Company, . . . is not shown to have had any knowledge of this incompetency", a balance of equities required a conclusion against the validity of the lease. The decree again set aside the deed of May 2, 1910; awarded rentals in the total sum of $606,785.75; annulled the lease of March 17, 1905, in so far as it affected the incompetent; annulled the contract for support and maintenance of August 31, 1906, and gave to Waialua the right to continue in the exclusive use and occupation of reservoirs, pumping stations, irrigation ditches and other improvements until partition or other arrangements were agreed upon. Appeal was taken from this decree.

In its second hearing, the Supreme Court of Hawaii maintained its finding as to the incompetency of Eliza at the time of the execution of the deed of May 2, 1910. It assumed that the trial court was correct in finding Eliza incompetent at the time of the execution of the lease of 1905 and the contract for maintenance of 1906,

and accepted the finding of the trial court that Waialua was not shown to have any knowledge of Eliza's incompetency at the time it took the lease of 1905. It determined that the deed of May 2, 1910, passed the contract rights assigned to Annie by Eliza and that Waialua succeeded to these rights as an innocent purchaser for value. It further held that the incompetent received an adequate consideration for the lease of 1905. In effect it held that the assignment of 1906 was also for an adequate consideration already largely received. The contract "was beneficial to Eliza." "Eliza had no income or other means of support." "In entering into this contract (1906) neither of the parties knew or could know how long a period of time would elapse before Eliza would become entitled to a share of the rents under the lease . . . ."[6]

In the final decree the deed of May 2, 1910, was set aside; the lease of 1905 and the contract of 1906 were sustained; the incompetent was required to pay or secure the payment to Waialua of the purchase price; Waialua was required to convey to the incompetent the one-third interest in fee simple which passed by the deed, with reservations by Waialua of certain portions occupied by its improvements and certain lands and rights of way for ditches, pipes, service, and roads necessary to maintain and distribute water and operate the plantation, and with provisions to insure to the incompetent rights of way for the operation of her properties, if and when the same were partitioned and set off.

We might summarize the factual situation arising from the two trials in the lower court and the two reviews in the supreme court of Hawaii as follows: Eliza Christian was found or assumed to have been incompetent at the time of the execution of the lease of 1905, the contract of 1906 and the deed of 1910. Waialua was not found to have known of this incompetency at the time it received any rights flowing from any of the instruments. It was determined that the status quo was restored in so far as the deed was concerned by the repayment of the purchase price with interest and that the Holt land could be separated from the rest of the plantation with proper adjustment for improvements.

Upon these facts the Supreme Court of Hawaii determined applicable principles of law. Those considered by the Circuit Court of Appeals were the following:

I. The rule of law in Hawaii is that the deed, lease or contract of an incompetent executed prior to a judicial declaration of in-

[6] Christian v. Waialua Agricultural Company, 33 Haw. 34, 51.

competency is voidable. A mere showing of incompetency will not avoid it. In determining whether it should be canceled, "all of the equities must be considered, including those in favor of the grantee or lessee as well as those in favor of the grantor or lessor."[7]

"It is our view of the law that a lease made by an incompetent, who has not been judicially declared insane, to a lessee without knowledge of the incompetency, for an adequate rental and upon other terms that are reasonable and fair, which is beneficial to the incompetent and is in effect a provision in favor of the incompetent for necessaries for his sustenance and comfort,—a lease which has been fully performed and is accompanied by no fraud or other circumstances of inequity to the incompetent,—should not be canceled,—even though the lessee can be restored to the *status quo ante.*"[8]

In its first opinion the court had said: "When the grantee can be restored to the position it occupied immediately prior to the conveyance the deed of the incompetent should be canceled even though it was taken in ignorance of the incompetency and even though the consideration paid was adequate."[9]

It did not refer in the second opinion to any conflict between the statements but found the distinction between the canceled deed and the confirmed lease and contract, in the relative advantages to the incompetent.[10]

II. The construction of the contract for maintenance of 1906[11] was that it covered rents, issues and profits, payable to the incompetent not only from the lessee under the 1905 lease but also "the rents accruing thereafter from whatever source."[12] This ruling was embodied in the language of the final decree set out in the note below.[13]

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7 Christian *v.* Waialua Agricultural Company, 33 Haw. 34, 40.

8 Christian *v.* Waialua Agricultural Company, 33 Haw. 34, 43.

9 Christian *v.* Waialua Agricultural Company, 31 Haw. 817, 888.

10 Christian *v.* Waialua Agricultural Company, 33 Haw. 34, 53.

11 Footnote 5.

12 Christian *v.* Waialua Agricultural Company, 33 Haw. 34, 52.

13 "That said instrument dated August 31, 1906, referred to in Paragraph VII hereof, conveyed all rents, issues and profits from the land described in the deed of May 2, 1910 . . . , which have accrued or will accrue to Eliza R. P. Christian, whether under the lease dated March 17, 1905, . . . or otherwise, and from whomsoever due, from August 31, 1906, the date of said instrument, until the end of the natural life of her, the said Eliza R. P. Christian, and that the respondent-appellant, Waialua Agricultural Company, Limited, is the owner of all said rents, issues and profits so conveyed; provided, however, Waialua Agricultural Company, Limited, shall pay all taxes and lawful assessments upon or against said land during the lifetime of the said Eliza R. P. Christian."

"By the deed of May 2, 1910, Annie Kentwell, a mentally competent person, transferred all of her rights under the instrument of 1906 to" Waialua.[14]

III. A court of equity may permit a grantee without notice of the incompetency, who has placed improvements on the land of an incompetent in reliance on a conveyance subsequently canceled, to reserve the improvements together with such land and rights of way over the incompetent's lands as may be necessary for their proper use under suitable conditions to be prescribed by the court.[15]

While the Circuit Court of Appeals accepted the findings of fact in the trial and appellate courts of Hawaii,[16] it took direct issue with some of the legal conclusions of the supreme court of the Territory and held as follows:

I. The general rule of law is that the deed, lease or indenture[17] of an incompetent, executed prior to a judicial declaration to that effect, is void. "Relief against such a contract should not be granted, however, on proof of incompetency only." "So, in the case of a contract made by an incompetent, after proof of the incompetency, relief will be granted against the contract, or refused, depending upon the situation of the parties at the time relief is asked; in other words, the situation of the parties is the controlling factor."[18] "This . . . does not mean that the court should balance all equities of the parties, as was done by the trial court."[19] "The rule as stated means that if the parties can be placed in statu quo, the relief will be granted."[20] This rule was held applicable to Hawaii.

Apparently in reliance on this rule, the lower court determined relief should be granted against the lease as to the lessor, Eliza Christian, or against the contract or against both, if she were incompetent at the time of the execution.[21] The territorial supreme court had denied relief "irrespective of the subject of status quo" and of competency.[22]

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14 Christian v. Waialua Agricultural Company, 33 Haw. 34, 52.

15 Christian v. Waialua Agricultural Company, 33 Haw. 34, 57.

16 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 609, 612; 94 F. (2d) 806, 807.

17 Christian v Waialua Agricultural Company, 93 F. (2d) 603, 611.

18 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 610.

19 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 611.

20 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 612.

21 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 613.

22 Christian v. Waialua Agricultural Company, 33 Haw. 34, 63.

II. The construction of the contract of maintenance of 1906 is that the incompetent assigned to Mrs. Kentwell her rents, issues and profits under the lease of 1905 only; that later rents, issues and profits were retained.[23]

III. The action of the territorial supreme court, in adjusting equities as to improvements by cross conveyances between the incompetent and the subsequent grantees, is incorrect.

"Here, if the company is entitled to an allowance for improvements at all, it is entitled to an allowance of one-third of the enhanced value of the land, due solely to the addition of improvements since May 2, 1910. That amount may be made a lien against the land, or may be set-off against the rentals, if any, which are found due to the ward."[24]

Status of the Supreme Court of Hawaii.—The lower court acquired jurisdiction of the appeals under Judicial Code, section 128.[25] When the Hawaiian Organic Act was passed in 1900, no provision was made for appeals from the territorial supreme court. In 1905, for matters involving more than $5,000, a direct appeal to this Court was provided.[26] In 1911 review of the territorial supreme court was placed upon the same basis as review of the highest court of a State, with a continued right of review, generally, where the amount involved $5,000.[27] Certiorari from this Court was provided by the Act of January 28, 1915, and for the first time review by circuit courts of appeals for cases involving $5,000 or over.[28] In each of these successive enactments the Congress has recognized, to some degree, the autonomous position of the Supreme Court of the Territory.

This recognition is natural. The territorial court has general appellate jurisdiction of cases involving the mores and statutes of an archipelago, the first known compilation of whose laws appeared

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23 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 615.

24 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 617.

25 "Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings." 43 Statutes at Large 936.

26 33 Statutes at Large 1035.

27 36 Statutes at Large 1158.

28 38 Statutes at Large 804.

in 1842.[29] Isolated until the day of electrical communication and aerial transportation from continuous contact with other peoples, and inhabited by diverse stocks of Oceanica, Asia, Europe and America, it developed, as an independent kingdom, a jurisprudence adapted to its needs. The constitution of Kamehameha III established a Supreme Court of the Kingdom in 1840 and defined its jurisdiction.[30] The common law and the civil law were sources of information but not of authority.[31] Until 1892,[32] lacunae were filled by the judges.[33] The laws developed were largely left in force by the Organic Act.[34] These now include a declaratory statute on the source of Hawaiian law.[35] This judicial tradition gives present

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[29] Preface to the Translation of the Constitution and Laws of the Hawaiian Islands.

[30] "Their business shall be to settle all cases of difficulty which are left unsettled by the tax officers and common judges. They shall give a new trial according to the conditions of the law. They shall give previous notice of the time for holding courts, in order that those who are in difficulty may appeal. The decision of these shall be final. There shall be no further trial after theirs. Life, death, confinement, fine, and freedom, from it, are all in their hands, and their decisions are final." Translation of the Constitution and Laws of the Hawaiian Islands, 1842, p. 20.

[31] "The reasonings and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom." Statute Laws of the Hawaiian Islands, 1845-47, Vol. II, p. 5.

[32] Hall *v.* Kennedy, 27 Haw. 626, 629.

[33] "Section 14. The Judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries." Hawaii Civil Code, 1859, p. 7.

[34] "Sec. 1. That the phrase 'the laws of Hawaii,' as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America." 31 Statutes at Large 141.

"Sec. 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." 31 Statutes at Large 142.

[35] "*Common law applies except when.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or by the Territory." Revised Laws of Hawaii, 1935, Ch. 1, Sec. 1, p. 73.

Cf. Kake *v.* Horton, 2 Haw. 209; Rex *v.* Tin Ah Chin, 3 Haw. 90, 95.

substance to the rule of this Court that deference will be paid the understanding of territorial courts on matters of local concern.[36]

Review of its Decisions.—While the determinations made by the territorial court upon the validity of instruments executed by incompetents, the interpretation of the contract of an incompetent, and the adjustments of equities concerning improvements after cancellation of a conveyance, partake of general law, as well as of local law,[37] we see no reason for not applying the rule as to local matters to these circumstances. While the [redacted]th section of the Judiciary Act is not applicable to territories, the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should declare the law of the territories with the least possible interference.[38] It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact[39] but we are of the opinion that this power should be exercised only in cases of manifest error. The differentiations, implicit and explicit, in the opinions of the Supreme Court of Hawaii, as to the rules of law applicable to the proceedings to set aside the deed of 1910 and those applicable to similar proceedings as to the lease of 1905 and the contract for maintenance of 1906, do not furnish occasion for reversal by the lower court.[40] In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.

Decision of the Supreme Court of Hawaii.—To adopt the legal principles applied by the territorial supreme court in these cases as rules of decision in that jurisdiction, or to construe instruments as it interpreted them, is not manifest error.

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[36] Matos *v.* Alonso Hermanos, 300 U. S. 430, 432; Kealoha *v.* Castle, 210 U. S. 149, 154; Lewers & Cooke *v.* Atcherly, 222 U. S. 285, 293; Ewa Plantation *v.* Wilder, 289 Fed. 664, 669.

[37] Black & White Taxi Co. *v.* Brown & Yellow Taxi Co., 276 U. S. 518, 526, 530.

[38] Cf. Swift *v.* Tyson, 16 Pet. 1; Erie R. R. *v.* Tompkins, 304 U. S. 64; Lewers & Cooke *v.* Atcherly, 222 U. S. 285, 294.

[39] Cf. Philippine Sugar Co. *v.* Philippines, 247 U. S. 385, 390.

[40] Cf. Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 201; Fidelity and Columbia Trust Company *v.* Louisville, 245 U. S. 54, 59.

Whatever may be the better rule as to the voidableness of the transfer documents of an incompetent, it is not clearly wrong to select the one here chosen.[41]

The construction of the contract of maintenance by the territorial court of last resort is likewise defensible. The lower court, itself, said the assignment of rents due to the incompetent "by virtue of being . . . devisee under the will . . . during the term of the natural life of her" the incompetent (see note 5, *supra*), might mean "that the ward assigned all rents including those to which she might be entitled under the lease to the company and any other lease."[42] The minority opinion reached this conclusion.[43] Although on consideration of the entire contract the majority reached a different answer, the interpretation of the Supreme Court of Hawaii is not manifestly erroneous. Nor do we see any occasion to reexamine the interpretation that the deed of May 2, 1910 (the relevant portions of which are set out above, [page 4]), conveyed the rents, issues and profits, assigned to Mrs. Kentwell.

The lower court considered it necessary to apply here the rule that the occupant of the land of another was entitled to be paid, as compensation for improvements, a sum equal to the amount by which the improvements increased the value of the property, not exceeding the cost. It is not always necessary so to penalize an innocent improver. If he is a tenant in common, partition may be made so as to set apart to him the portion improved.[44] Under the circumstances here disclosed, the action of the Hawaiian court in awarding to Waialua the realty and improvements described in the decree need not be set aside.

Decree of the lower court reversed and decree of the Supreme Court of Hawaii affirmed.

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41 2 Black, Rescission and Cancellation (2nd Ed.), §§ 255-258; 1 Williston, Contracts (Revised Edition, 1936-38), § 254; Imperial Loan Co., Ltd. v. Stone, (1892) 1 Q. B. 599; Casebier v. Casebier, 193 Ky. 490.

42 Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 615.

43 "In my opinion the agreement of August 31, 1906, from Eliza Christian to Annie Kentwell, in consideration of her support and maintenance during the balance of her life, purported to convey not only all the rents accruing to Eliza Christian under the lease of 1905 after the contingent remainder of Eliza Christian became vested in 1922 upon the death of her father, as held by the majority opinion, but also all the rents, issues, and profits after the expiration of the lease and until her death." Christian v. Waialua Agricultural Company, 93 F. (2d) 603, 618.

44 See Highland Park Mfg. Co. v. Steele, 232 Fed. 10, 34, modified 235 Fed. 465; Cochran v. Shoenberger, 33 Fed. 397, 398; Ford v. Knapp, 102 N. Y. 135, 140.